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5 UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA
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9 STEPHEN C. SIMMONS,
10 Plaintiff,
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12 v.
13 KEVIN KRUEGER,
14 Defendant.

15 CASE NO. C13-6023 BHS
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17 ORDER GRANTING
DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT
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23 This matter comes before the Court on Defendant Kevin Krueger's ("Krueger")
24 motion for summary judgment (Dkt. 26). The Court has considered the pleadings filed in
25 support of and in opposition to the motion and the remainder of the file and hereby grants
26 the motion for the reasons stated herein.

27 **I. PROCEDURAL HISTORY**

28 On June 10, 2014, Plaintiff Stephen Simmons ("Simmons") filed an amended
complaint against Kevin Krueger and the State of Washington. Dkt. 17. On September
2, 2014, the Court granted the State of Washington's motion to dismiss. Dkt. 24.

30 On October 16, 2014, Krueger filed a motion for summary judgment. Dkt. 26. On
31 November 3, 2014, Simmons responded. Dkt. 28. On November 11, 2014, Krueger
32 replied. Dkt. 32.

1 **II. FACTUAL BACKGROUND**

2 This case stems from Simmons's allegations of retaliation by his former
3 supervisor, Krueger. With regard to the present motion, Simmons declares that Krueger
4 failed to provide performance reviews for the years 2009 and 2010; Krueger has failed to
5 produce Simmons's 2008 review, which recommended a 3% raise; and that Krueger is
6 responsible for the stripping of Simmons's job responsibilities in 2012 and an
7 intimidating letter sent in November 2012. Dkt. 30, Declaration of Stephen Simmons;
8 Dkt. 28 at 2–9.

9 **III. DISCUSSION**

10 In this case, Krueger moves the Court to enter judgment in his favor on
11 Simmons's claim for retaliation under the Washington Law Against Discrimination,
12 RCW Chapter 49.60 ("WLAD"), and his claim for violation of Simmons's First
13 Amendment rights. Dkt. 26.

14 **A. Summary Judgment Standard**

15 Summary judgment is proper only if the pleadings, the discovery and disclosure
16 materials on file, and any affidavits show that there is no genuine issue as to any material
17 fact and that the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c).
18 The moving party is entitled to judgment as a matter of law when the nonmoving party
19 fails to make a sufficient showing on an essential element of a claim in the case on which
20 the nonmoving party has the burden of proof. *Celotex Corp. v. Catrett*, 477 U.S. 317,
21 323 (1986). There is no genuine issue of fact for trial where the record, taken as a whole,
22 could not lead a rational trier of fact to find for the nonmoving party. *Matsushita Elec.*

1 1 *Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986) (nonmoving party must
 2 present specific, significant probative evidence, not simply “some metaphysical doubt”).
 3 3 *See also* Fed. R. Civ. P. 56(e). Conversely, a genuine dispute over a material fact exists
 4 if there is sufficient evidence supporting the claimed factual dispute, requiring a judge or
 5 jury to resolve the differing versions of the truth. *Anderson v. Liberty Lobby, Inc.*, 477
 6 U.S. 242, 253 (1986); *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass’n*, 809 F.2d
 7 626, 630 (9th Cir. 1987).

8 The determination of the existence of a material fact is often a close question. The
 9 Court must consider the substantive evidentiary burden that the nonmoving party must
 10 meet at trial – e.g., a preponderance of the evidence in most civil cases. *Anderson*, 477
 11 U.S. at 254; *T.W. Elec. Serv., Inc.*, 809 F.2d at 630. The Court must resolve any factual
 12 issues of controversy in favor of the nonmoving party only when the facts specifically
 13 attested by that party contradict facts specifically attested by the moving party. The
 14 nonmoving party may not merely state that it will discredit the moving party’s evidence
 15 at trial, in the hopes that evidence can be developed at trial to support the claim. *T.W.*
 16 *Elec. Serv., Inc.*, 809 F.2d at 630 (relying on *Anderson*, 477 U.S. at 255). Conclusory,
 17 nonspecific statements in affidavits are not sufficient, and missing facts will not be
 18 presumed. *Lujan v. Nat’l Wildlife Fed’n*, 497 U.S. 871, 888-89 (1990).

19 **B. Statute of Limitations**

20 Washington’s three-year statute of limitations applies to claims for retaliation
 21 under both the WLAD and § 1983. RCW 4.16.080(2); *Washington v. Boeing Co.*, 105
 22 Wn. App. 1, 7-8 (2000) (WLAD); *RK Ventures, Inc. v. City of Seattle*, 307 F.3d 1045,

1 1058 (9th Cir. 2002) (§ 1983). It is undisputed that the statute bars claims for any act
2 before September 28, 2010. Dkt. 28 at 16.

3 In this case, Simmons argues that his claims are not barred by the statute of
4 limitations. First, Simmons argues that the Court should apply the continuing violations
5 doctrine. Dkt. 28 at 15–18. This doctrine, however, is only applicable to hostile work
6 environment claims because such claims are “composed of a series of separate acts that
7 collectively constitute one unlawful employment practice” *Loeffelholz v. University*
8 *of Washington*, 162 Wn. App. 360, 367 (2011), *aff’d in part, rev’d in part on other*
9 *grounds*, 175 Wn. 2d 264 (2012). In fact, the Supreme Court has specifically
10 distinguished discrete acts that form the basis of retaliation claims from continuing
11 practices that form the basis of hostile work environment claims. *National R.R.*
12 *Passenger Corp. v. Morgan*, 536 U.S. 101, 114–117 (2002) (“Each incident of
13 discrimination and each retaliatory adverse employment decision constitutes a separate
14 actionable “unlawful employment practice.””). Therefore, the Court declines to apply
15 the continuing violations doctrine to Simmons’s retaliation claims and Simmons must
16 allege a discrete act of discrimination within the appropriate period.

17 Second, Simmons asserts that Krueger’s failure to provide annual performance
18 reviews for 2009 and 2010 are discrete omissions that occurred after September 28, 2010.
19 Dkt. 28 at 16–18. But Simmons provides no evidence that Krueger had an affirmative
20 obligation to provide a review between the statutory bar date of September 28, 2010 and
21 the date Simmons was reassigned away from Krueger on October 12, 2010. If Krueger
22 was required to provide a review on a date within those two weeks and refused to do so,

1 then Simmons may be able to show that he suffered an adverse employment action within
2 the relevant time frame. Simmons, however, may not turn a failure to perform a general
3 yearly obligation into an adverse act on a specific date that is convenient for litigation
4 purposes. Therefore, the Court grants Krueger's motion that Simmons's claims based on
5 actions occurring before September 28, 2010 and the failure to provide performance
6 reviews are barred by the statute of limitations.

7 **C. WLAD Retaliation**

8 "An actionable adverse employment action must involve a change in employment
9 conditions that is more than an 'inconvenience or alteration of job responsibilities,' such
10 as reducing an employee's workload and pay." *Tyner v. State*, 137 Wn. App. 545, 564–
11 65 (2007) (quoting *Kirby v. City of Tacoma*, 124 Wn. App. 454, 465 (2004)).

12 In this case, Simmons asserts three acts of retaliation that occurred after the
13 statutory bar. First, Simmons argues that the destruction of his 2008 performance review
14 is a discrete act of retaliation that presumptively occurred during the course of litigation.
15 Dkt. 28 at 19–21. Simmons, however, fails to show that the alleged destruction of the
16 review is an adverse employment action that involved a change in employment
17 conditions. Krueger does not dispute that it existed or the contents of the review and the
18 recommended pay raise. While such failure to produce the review may establish an
19 inference to support Simmons's allegations of discrimination, it does not establish an
20 independent act of retaliation by Krueger. Therefore, the alleged failure to produce
21 requested discovery is not an actionable retaliatory employment action.

1 Second, Simmons argues that he was “stripped” of his normal job responsibilities
2 on April 26, 2014. Simmons, however, has failed to produce any evidence that Krueger
3 was responsible in any way for this action. In fact, Simmons asserts that he was
4 transferred away from Krueger in 2010. Simmons has failed to show that this is an act of
5 retaliation or that Krueger was individually responsible for the adverse action.

6 Third, Simmons contends that the lawyers representing Krueger sent an
7 intimidating letter on November 12, 2014. Simmons fails to show that the letter resulted
8 in the alteration of the conditions of his employment. Even if it did, Simmons fails to
9 show that Krueger is individually responsible for the letter. Therefore, the Court grants
10 Krueger’s motion on Simmons’s WLAD retaliation claim.

11 **D. 42 U.S.C. § 1983**

12 Section 1983 is a procedural device for enforcing constitutional provisions and
13 federal statutes; the section does not create or afford substantive rights. *Crumpton v.*
14 *Gates*, 947 F.2d 1418, 1420 (9th Cir. 1991). In order to state a claim under section 1983,
15 a plaintiff must demonstrate that (1) the conduct complained of was committed by a
16 person acting under color of state law and that (2) the conduct deprived a person of a
17 right, privilege, or immunity secured by the Constitution or by the laws of the United
18 States. *Parratt v. Taylor*, 451 U.S. 527, 535 (1981), *overruled on other grounds by*
19 *Daniels v. Williams*, 474 U.S. 327 (1986).

20 In this case, Simmons argues that Krueger violated Simmons’s First Amendment
21 right to engage in protected speech. Simmons’s speech is protected only if he spoke “as a
22 citizen upon matters of public concern” rather than “as an employee upon matters only of

1 personal interest.” *Roe v. City of San Diego*, 356 F.3d 1108, 1112 (9th Cir. 2004).
 2 “Speech that deals with ‘individual personnel disputes and grievances’ and that would be
 3 of ‘no relevance to the public’s evaluation of the performance of governmental agencies’
 4 is generally not of ‘public concern.’” *Coszalter v. City of Salem*, 320 F.3d 968, 973 (9th
 5 Cir. 2003) (quoting *McKinley v. City of Eloy*, 705 F.2d 1110, 1114 (9th Cir. 1983)). The
 6 trial court, not the jury, determines, as a matter of law, whether the speech at issue
 7 involves an issue of public concern. *Rankin v. McPherson*, 483 U.S. 378, 386 n. 9
 8 (1987).

9 Simmons fails to show that his speech was a matter of public concern. Other than
 10 citing a fair amount of cases wherein the courts determined that the speech was of public
 11 concern, Simmons fails to provide a single instance of speech that would be considered
 12 outside an individual personnel dispute. Dkt. 28 at 12–14. Failing to make an adequate
 13 showing on an essential element of his claim is fatal to Simmons’s case. Therefore, the
 14 Court grants Krueger’s motion on Simmons’s § 1983 claim.

15 IV. ORDER

16 Therefore, it is hereby **ORDERED** that Krueger’s motion for summary judgment
 17 (Dkt. 26) is **GRANTED**. The Clerk shall enter judgment in favor of Defendant.

18 Dated this 23rd day of December, 2014.

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 21 BENJAMIN H. SETTLE
 United States District Judge
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